

July 26, 2002

**Utah Attorney General's Opinion No. 02-002**

Major General Brian L. Tarbet  
Adjutant General  
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Draper, Utah 84020-1776

RE: Request for Opinion on Paid Military Leave

Dear Major General Tarbet:

This letter is in response to your request for an opinion regarding the legal basis for paid military leave for government employees. Because this request arises out of a decision by the Utah County Commission to eliminate its policy of providing eleven days paid military leave for Utah County employee reservists, at the behest of, and based upon the legal advice of Utah County Attorney Kay Bryson, this opinion responds to your request within that context.<sup>(1)</sup> The opinions of Mr. Bryson, as referred to herein, are found in the attached copies of Memorandums to the Utah County Commission dated August 5, 1999, January 10, 2000, and April 20, 2000, respectively. See Exhibits [C](#), [D](#) and [E](#).

**LEGAL ISSUES**

(1) Whether Utah County's former military leave policy of providing eleven days paid military leave to Utah County employee reservists violates the equal protection provisions of the Fourteenth Amendment to the United States Constitution by failing to provide for an equal period of paid leave for non-reservist employees who desire to pursue outside employment.

(2) Whether Utah County's former policy of providing eleven days paid military leave to Utah County employee reservists is either illegal or unconstitutional under Utah law as an unlawful transaction or disbursement of government funds or resources based on lack of adequate consideration.

**DISCUSSION**

**INTRODUCTION**

Utah County's former military leave policy providing for eleven days of paid military leave represents a widely accepted nationwide practice found at all levels of government. At the state level, the State of Utah provides by law for up to fifteen days paid military leave for "[A]ll state employees who are members of the organized reserve of the United States armed forces, including the National Guard . . . for all time . . . spent on duty at annual encampment . . . or other duties in connection with . . . reserve training and instruction requirements of the armed forces of the United States . . . ." Utah Code Ann. § 39-3-2(1) (2002). At

the county and city level, many of the counties and cities within the state of Utah, including Salt Lake County and Salt Lake City, likewise provide for military leave. See [Exhibit F](#), State of Utah Military Leave Policies. With regard to other states, ". . . most state legislatures [similarly] provide incentives for public employees willing to volunteer for [one of the military reserve forces]." Samuel Asbury, *Comment: A Survey and Comparative Analysis of State Statutes Entitling Public Employees to Paid Military Leave*, 30 Gonz. L. Rev. 67, 68 (1994/1995); see also *id.* at 95 (table attached as [Exhibit G](#)). And at the federal level, Congress has authorized up to fifteen days paid military leave for federal employees pursuant to 5 U.S.C. § 6323(a)(1) (2002). Based on legal research and investigation conducted to date, this office has found no evidence of any successful legal challenge to any reasonably drafted military leave law or policy such as those referred to above.

By way of additional background and chronology, Utah County employs approximately nine hundred people. Of that number, not more than twenty five are believed to be members of the National Guard or other reserve units.<sup>(2)</sup> Based on review of minutes of the Utah County Commission, the Commission apparently discussed the issue of military leave at an open meeting on December 5, 2000, then rescheduled the issue for rehearing on December 19. When December 19 came, no hearing was held. Instead, the Commission eliminated by resolution Utah County's military leave policy the day after Christmas, on December 26, 2000. See [Exhibit H](#). In reviewing Bryson's three memoranda to the Commission, action to eliminate paid military leave apparently originated with Mr. Bryson. As indicated by his Memorandum of January 10, 2000, Bryson told the Commission that he felt strongly enough about the issue that he "would consider seeking judicial adjudication to resolve it." [Exhibit D](#).

## MILITARY LEAVE AND EQUAL PROTECTION

We respectfully disagree with Mr. Bryson's contention that Utah County's prior military leave policy is unconstitutional on grounds that "not allowing other county employees an equal period of paid leave to pursue a second job of their choice . . . violates the equal protection provisions of the Fourteenth Amendment . . ." "[b]ecause being a military reservist is . . . essentially just a second job . . ." [Exhibit C](#). The purpose of the Fourteenth Amendment is to preserve a citizen's right to due process and equal protection under law. With regard to equal protection, the Amendment states that "[n]o State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. The Fourteenth Amendment protects against improper government use of classifications and against government actions which burden fundamental rights. Classifications which impact a "suspect class" such as race (see *Strauder v. West Virginia*, 100 U.S. 303 (1880); see also *Rogers v. Lodge*, 458 U.S. 613 (1982)) or national

origin (see *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); see also *Hernandez v. Texas*, 347 U.S. 475 (1954)), or which burden a fundamental right such as the right to vote (see *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966)) (imposition of a poll tax violates Fourteenth Amendment Equal protection provisions), the right of access to the courts (see *Bodie v. Connecticut*, 401 U.S. 371 (1971)) (denial of access to divorce, because plaintiff could not pay \$60 filing fee, violated plaintiff's due process rights), or the right to travel (see *Shapiro v. Thompson*, 394 U.S. 618 (1969)) (state imposition of one year waiting period for receiving welfare benefits impaired the right of interstate travel), require the government to have a "compelling interest" and are subject to a test of "strict scrutiny" by the courts. Any legislation that infringes on a fundamental right or targets a suspect or particular class of individuals, would likely be struck down under the strict scrutiny test.

In the present case, the classification employee/military reservist does not impact a suspect class, nor does it burden any fundamental right. Where there is no suspect classification or fundamental right at issue, equal protection is satisfied as long as the classification is rationally related to a legitimate state interest or end. See *Vacco v. Quill*, 521 U.S. 793, 799 (1997); citing *Romer v. Evans*, 517 U.S. 620 (1996).

The constitutional legitimacy of government actions benefiting military personnel is well established at law. In *Personnel Adm'r of Mass. v. Feeney*, the United States Supreme Court upheld a Massachusetts statute granting an absolute preference in civil service hiring to veterans over non-veterans in the face of a claim that such a preference constituted gender discrimination. 442 U.S. 256 (1979). In *Hooper v. Bernalillo County Assessor*, the Court confirmed the validity of statutory preferences for veterans, explaining that "[r]esident veterans, as a group, may well deserve preferential treatment, and such differential treatment vis-a-vis non-veterans does not offend the Equal Protection Clause." 472 U.S. 612, 620 (1985). In *Regan v. Taxation With Representation of Wash.*, the Court noted that "[o]ur country has a long standing policy of compensating veterans for their past contributions by providing them with numerous advantages. This policy has 'always been deemed to be legitimate'." 461 U.S. 540, 551 (1983). Other classifications that distinguish by military status include: The Soldiers' and Sailors' Civil Relief Act (50 U.S.C. §§ 501 - -548, 560 - -591 (2002)), the Veterans' Benefit Act (38 U.S.C. §§ 101 - -8527 (2002)), the Uniformed Services Employment and Reemployment Rights Act (38 U.S.C. §§ 4301, et. seq (2002)), and the Veterans' Readjustment Act. 38 U.S.C. §§ 4301- -4307 (2002).

Policy reasons demonstrating a legitimate state interest in support of paid military leave have been expressed by the courts and government as follows: (1) As noted by the Pennsylvania Supreme Court, "[t]he discipline, loyalty and public spirit necessarily acquired by the military reservist are conducive to the better performance of his duties as a public employee [and] the public unquestionably

derives benefit therefrom . . ." *Loomis v. Board of Educ.*, 103 A.2d 769, 773 (1954); (2) "The maintenance of active forces is extremely costly . . . [and] Guard and Reserve forces . . . are maintained in readiness at a lesser cost than in the active military." H.R. Rep. 94-1069, 1976 U.S.C.C.A.N. 1034, 1037); (3) "[Paid military leave] may be helpful to recruitment and employee morale, and military training may improve . . . performance on the job." *Bowers v. City of Buenaventura*, 142 Cal. Rptr. 35, 39 (1977); (4) Providing paid military leave "provide[s] an incentive for public employees to join the National Guard." *Marchant v. Hamilton*, 309 S.E.2d 781, 783 (S.C. 1983); and (5) "[Paid military leave] provide[s] for national defense and civil calamity by encouraging public employees to join the military reserve organizations so as to be ready for call in times of emergency." *Bowers*, 142 Cal. Rptr. 35, 38. "[W]e construe [this paid military leave statute] to be an inducement to the reservist to keep current his special talents to preserve our potential military might and to insure him against loss of benefits . . . ." *Parks v. Union County Park Comm'n*, 71 A.2d 651, 654 (N.J. Super. Ct. App. Div. 1950); "The maintenance of the armed military units . . . is of great public importance." *Lynch v. Borough of Edgewater*, 85 A.2d 191, 196 (N.J. 1951).

Inasmuch as any or all of the above reasons would provide a rational basis in support of Utah County's military leave policy, any contention that the policy somehow violates the equal protection clause of the Fourteenth Amendment is unfounded under any existing law or legal precedent.

## MILITARY LEAVE AND DISBURSEMENT OF FUNDS

Claiming that military leave is "unlawful and unconstitutional" under Utah law, Mr. Bryson further opines, based on *Salt Lake County Comm'r v. County Attorney*, 985 P.2d 899 (Utah 1999) ("*Commission v. Short*") "and other cases and statutes cited therein," that "it [is] a violation of the Utah Constitution to pay military reservists with county funds for periods of time they are on active duty with the military and not engaged in the responsibilities of their county positions" because, he says, ". . . the county cannot disburse county funds or resources unless it receives 'adequate consideration'." Exhibits [C](#) and [D](#). According to Bryson, eleven days of paid leave is a "gift" which is "not a benefit to . . . [Utah C]ounty." [Exhibit C](#).

The cases and authority cited or referred to by Bryson in his memoranda to the Utah County Commission do not address military leave and, in our opinion, have little or no application to the subject matter of employee compensation or leave. In *Commission v. Short*, the Salt Lake County Commission made three specific charitable contributions to the following entities: the Christmas in April Program, the Good Samaritan program, and the Utah Issues Poverty Conference. In deciding whether the disbursements were proper, the Utah Supreme Court looked to both statutory and case law, including Section 17-4-4 of

the Utah Code, *Sears v. Ogden City* (533 P.2d 118 (Utah 1975)), and *Municipal Bldg. Auth. of Iron County v. Lowder* (711 P.2d 273, 278 (Utah 1985)). As the controlling statutory law in the *Short* case, Section 17-4-4 states that "[n]o county shall in any manner give or lend its credit to or in aid of any person or corporation, or appropriate money in aid of any private enterprise." Utah Code Ann. § 17-4-4 (2002) (emphasis added.) In construing Section 17-4-4, the Court looked, in the *Short* case, to Article 6, Section 29 of the Utah Constitution, noting that the policy of Section 17-4-4 was "aimed at preventing government from in any way using public assets for private purposes." *Short*, 985 P.2d at 909. In holding that use of county funds for charitable contributions not tied to any specific services to be rendered violated Section 17-4-4 as a use of funds in aid of private enterprise, the Court found that the three charitable entities at issue were private enterprises. In order to avoid the statute's ban on transfers in aid of a private enterprise, the contributions at issue would have to have "been given for fair value in goods and services." *Id.* at 910

In the case of *Sears v. Ogden City*, Ogden City undertook to close and vacate a public street and make a gift of the property to the Board of Education of Ogden City. Relying in that case on Section 10-8-2 of the Utah Code, which deals with the authority of municipalities to dispose of property, the Court held that Ogden City could not dispose of property by gift absent specific legislative authority allowing it to do so. In the case of *Municipal Bldg. Auth. v. Lowder*, where Iron County sought to transfer the Old Iron County jail and its site to the Iron County Municipal Authority for a nominal sum, the Court similarly held that the existing jail site could not be transferred in fee for less than fair and adequate consideration. What the foregoing cases clearly stand for is the basic principle that a government entity is required to receive fair value in goods or services, that is, "adequate consideration" where there is a transaction or exchange which involves a transfer of government funds or property to a private party or entity.

In contrast, in the context of public employment, employee leave is an integral part of an employee's overall compensation and is essentially part of an employment compensation package consisting of salary, leave, retirement, and other benefits. As an integral part of employee compensation, leave is calculated or factored in along with salary and other benefits. Accordingly, the compensation package effectively constitutes the employer's assessment and judgment as to the worth and value of the employee and his services to the organization. When the employee agrees and accepts employment, the entire compensation package effectively represents the consideration for the employer/employee contractual relationship. Whether offered for purposes of vacation, sickness, military duty, or some other purpose, employee leave does not constitute a "gift" because it represents the employer's judgment of the employee's worth and value to the organization, and the employee's acceptance thereof. Accordingly, leave is effectively part of a bargained for and agreed to compensation package; not a gift.

We further disagree with the contention that ". . . it [is] a violation of the Utah Constitution to pay military reservists with county funds for periods of time they are on active duty with the military and not engaged in the responsibilities of their county positions." [Exhibit D](#). If that were the case, it would also be necessary to eliminate vacation and sick leave, because county employees who take vacation or sick leave are likewise not engaged in the responsibilities of their positions and are, therefore, also receiving county funds while engaged in something other than county business. In accordance with that reasoning, vacation and sick leave must be considered a "gift" because there can be no present benefit that would reflect present market value or adequate consideration where an employee is not engaged in county business. Finally, even Utah County's own pension plan, which matches up to 5% of an employee's contribution, could also be suspect because it would be difficult to demonstrate how the county receives any "clear and present" benefit for its expenditure of public funds. See [Exhibit I](#) (Utah County Government - Merit Employment Benefits).

This office is not aware of any existing case law that would preclude a government entity from including paid military leave as a reasonable part of an employee's compensation. Moreover, given the many human factors that legitimately influence or determine employee compensation, such as experience, training, character, leadership, etc., and that contribute to an employee's overall value and worth, it is highly unlikely that Utah courts would equate a transaction or exchange involving a transfer of government property or funds to a private party or entity to the subject matter of employee leave or compensation.

Military leave does not involve use of "public assets for private purposes," nor any transfer of money "in aid of private enterprise." Military leave is, rather, a publicly directed policy designed to encourage participation in the reserve components. In turn, the reservist renders public service in defense of the nation. That paid military leave is clearly not akin to an unlawful transfer of public assets or aid to a private entity or individual is further supported by the case of *Lynch v. Borough of Edgewater*, 85 A.2d 191 (N.J. 131). In *Lynch*, a military reservist brought an action against the Borough of Edgewater to recover his salary as a patrolman during a period of leave of absence while on active duty. In opposing the action, the Borough contended that the New Jersey law was unconstitutional as a donation of public money to private individuals in violation of the New Jersey Constitution. Rejecting that contention, the New Jersey Supreme Court indicated that the proper test was whether the statute in question was enacted for a private or public purpose. Finding that "[a]ll alike, whether liable to military duty or not, were interested in the maintenance of the Government to support which armies are raised [and that] [t]he State of New Jersey, as an organized political community, was interested in supporting the Federal Government and strengthening its armies," the court concluded that the statute "was designed to provide for expenditures of money for the protection of the person, property and



rights of the residents of the municipality as well as of every other citizen of the State" and was, therefore, "for a public purpose." *Id.* at 197.

The *Lynch* Court also addressed, in effect, Bryson's position that military leave is somehow improper on grounds that it benefits only reservists and results in more pay for less work.<sup>(3)</sup> See Exhibits [C](#), [D](#), and [E](#). In *Lynch*, the New Jersey Supreme Court responded to a similar argument "that the effect of the [New Jersey] statute . . . [was] to increase the compensation of all reserve officers in public (state or municipal) service . . ." and was "therefore . . . special legislation . . . [relating] only to reservists." *Lynch*, 85 A.2d at 197. The New Jersey Supreme Court, noting that the statute was general in its application and did not increase the pay of reservists, stated: "On the contrary the enactment maintains the level of compensation paid by the state public body. The effect adverted to by the defendant is caused by additional pay received by the employee as a member of the armed services on active duty." *Id.*

By way of summary, there is no legal basis, in our opinion, for the contention that Utah County's military leave policy is unlawful or unconstitutional under Utah law. As an integral part of employee compensation, leave is clearly not a transaction or exchange involving transfer of government funds or property to a private party or entity. Military leave is, rather, a publicly directed form of compensation for which the military reservist renders public service in furtherance of the security and defense of the United States of America, including that of Utah County.

## POLICY AND FACTUAL REPRESENTATIONS

At pages one and two of his August 5, 1999 Memorandum, Mr. Bryson states reasons, he believes, military leave should be eliminated: The county policy and the state statute, I believe, have their origins in the Vietnam war era when there was active conscription of young adult males into the military service. Men of draft age either went into the military full-time or joined a reserve component of the armed services. Unless medically disqualified, all men of appropriate age were expected to be available and to serve in the military in one form or another. Today, the Selective Service organization of the federal government does not function,<sup>(4)</sup> young men are not being conscripted into military service, and service in a military reserve unit is essentially a second job. It is a second job that provides not only additional monthly income but a substantial retirement benefit.

[Exhibit C](#). The contention that service "in a military reserve unit is essentially [just] a second job . . ." is unfounded. *Id.* Unlike any "second job," military reservists may be required to forfeit their lives in defense of the nation; they may be involuntarily called to active service at any time; and, they may be required to serve at great personal sacrifice far from home and family. Unlike any civilian job, reservists are also subject to the Uniform Code of Military Justice which is

designed to ensure obedience, discipline, order, and military efficiency. Military service additionally requires considerable study, education, and training (e.g., Officer Basic and Advanced Courses, Command and General Staff College, etc.) which frequently occurs outside normal duty hours. As to retirement and pay, it is curious that an elected public official would choose to disparage a reasonable retirement benefit for twenty or more years of service commencing at age sixty, or "additional" monthly compensation (not paid for by the county) for duty which generally occurs during weekends or evenings.

The arguments proffered for eliminating military leave also overlook the practical and historical significance of conversion of the nation's defense to an all volunteer force. When the United States chose to no longer rely upon the draft in 1973, the defense and security of the nation was thereupon transferred to young men and women willing to voluntarily join and serve in the armed forces. Under the "Total Force" concept, the reserve components support and serve with active component troops and units. As noted by then U. S. Air Force Chief of Staff General Michael E. Ryan speaking to the Air National Guard Senior Commanders Conference, "[T]he Total Force requires the unique contributions of its active and Reserve Components and its civilian employees. All elements of the Total Force must be appropriately organized, modernized, trained, and integrated." Gen. Michael E. Ryan, U.S. Air Force Chief of Staff, *Address at Air National Guard Senior Commanders Conference*, Washington D.C., Dec. 3, 1997. Referring to the Air National Guard specifically, General Ryan further noted that "there are more than 3,000 members of the Air National Guard deployed around the globe supporting our nation's missions, working side by side with the active duty and reserve members of the Air Force team." *Id.* Since the events of September 11, 2001, and now more than ever, the active component depends heavily on National Guard and Reserve units to accomplish its mission.<sup>(5)</sup> Accordingly, laws and policies which encourage membership and participation in the reserve components have become much more critical to the defense and security of the United States than they ever were at the time of the draft.

At page 2 of his August 1999 Memorandum, Bryson alleges additional reasons for abolishing Utah County's military leave policy as follows: Allowing military reservists 11 days paid leave creates hard feelings, resentment, and lowered morale among other county employees who are asked to pick up the slack for reservists on active duty. The ordinary county employee sees the reservist being paid two salaries for doing one job while the non-reservist must do all or a part of two jobs for no additional pay. The net result of the present policy means the county is a participant in an arrangement where, as between similarly situated county employees, the reservist gets more money for less work and the non-reservist gets less money for more work. [Exhibit C](#) Here again, we respectfully disagree, and note that the foregoing contentions are contrary to our collective experience in government agencies and entities. But even assuming for the sake of argument that such conditions exist to some



degree, the expressed concerns are amenable to resolution through good leadership, example, and effective management. As a practical matter, military leave should be no more disruptive than any other type of leave because it is generally preceded by advance notice. Accordingly, military leave can be scheduled and planned for by both the reservist and management. In our experience, military reservists may in fact work harder or longer hours before and after scheduled leave in order to minimize disruption or to compensate for time otherwise lost.

In our opinion, all government entities clearly "benefit" from providing military leave. As stated by the New Jersey Supreme Court in *Lynch*, "[t]he maintenance of the armed military units, trained and always prepared for immediate commitment to organized defensive battle . . . is of great public importance." *Lynch*, 85 A.2d at 196. Moreover, as further noted by the *Lynch* Court, the military leave statute at issue "was designed to provide for expenditures of money for the protection of the person, property and rights of the residents of the municipality as well as of every other citizen of the state," and "was for a public purpose." *Id.* at 197 (emphasis added) (see also *Marchant*, 309 S.E.2d at 783 (noting clear purpose for state encouragement of public employee participation in the National Guard)). Further, as noted in *Loomis*, "[t]he discipline, loyalty and public spirit necessarily acquired by the military reservist are conducive to the better performance of . . . duties as a public employee . . . [and] the public unquestionably derives benefit therefrom . . ." *Loomis*, 103 A.2d at 773. As recently observed by a Utah County reservist/employee to this office, "[w]hat person in this country doesn't benefit from all of us in the Armed Forces?"

That the training, service, discipline, loyalty and public spirit necessarily acquired through military service is of considerable worth to the public and government alike is not subject to reasonable dispute. Nevertheless, a number of the benefits to Utah County, as recently expressed to this office by Utah County employee/reservists, are as follows:

(1) Utah County . . . has received many benefits from my National Guard Unit that it was my responsibility as a platoon leader and later commander to help arrange. Equipment and personnel from my unit have supported fire fighters every year by transporting and supporting them at the various fires in this county and state. Out-of-state fire crews also stay at my armory while they are here fighting fires in the county. This draws upon the resources, equipment and personnel of my unit to provide them with what they need. I spent 11 days on duty with the National Guard during the Olympics. My battalion was designated to supplement local law enforcement in the event of a riot or disaster. In conversations with various law enforcement officers in this county, I discovered that many police agencies in Utah County intended on relying on the National Guard to deal with these situations and had only limited training in Mobile Field Force tactics.

(2) I have tried to assist the Sheriff's Office and Utah County in the past through my knowledge of the resources the National Guard has available to the communities they serve. In the past, I have helped to arrange the use of facilities at Camp Williams for the Jail's Detention Response Team, including the obstacle course, rappel towers, and the facilities that are used to train building clearing and urban warfare . . . . I have also helped to arrange the use of the facilities at the armory in Spanish Fork for training the Sheriff's Office in Mobile Field Force tactics just prior to the Olympics and a familiarization course in night vision equipment for the Jail Detention Response Team. The Sheriff's Office has utilized several skills that I and other Guardsmen here gained from the military to train Sheriff's Office personnel. I have been involved in training the Jail Detention Response Team in squad level tactics to search the perimeter of the Jail for escaped prisoners, basics of NBC masking and decontamination procedures, firearms training, basic map reading and land navigation. By having me train others using the skills I have gained from the National Guard, the county has saved great amounts of money that would have been spent bringing in outside instructors. I have also been asked to help establish and coordinate Mobile Field Force training for the Sheriff's Office. I was chosen for this task because of the extensive training I received from the National Guard to prepare for the Olympics.

(3) I have received a great deal of training from the National Guard both before and during my employment with Utah County. I am currently in a supervisory position with the Sheriff's Office. I attribute my rapid promotion to Sergeant in only three years here to the leadership and supervisory training I received in the Guard.

(4) I have attended ROTC, OBC, OAC and Commanders Conferences before and during my employment. These courses have been invaluable in preparing me for supervisory positions both in and out of the Guard. This is in addition to the practical experience in supervising that I received from positions in my unit. I learned many supervisory techniques, methods for counseling and evaluating from the National Guard. This training and experience has allowed me to succeed as a supervisor with the Sheriff's Office.

(5) In addition to the supervisory skills, I have gained experience and skills that serve me as a deputy. The firearms training and practice that I receive from the National Guard is a necessary supplement to the training I receive from the Sheriff's Office in these times of budget constraints . . . . The training that I have received in land navigation, radio operations, radio procedures, GPS systems, off-road vehicle operations, vehicle recovery, surveillance and patrolling will serve me well in some of the more rural or mountainous areas the Sheriff's Office covers.

(6) My training in the Guard that would be beneficial to the Sheriff's Department would be as follows: Basic non-commissioned officers School. This is a requirement to become a section leader, it teaches leadership and management of your peers, this is invaluable training for the department.

(7) During the fire season I have taken our cargo trucks to transport fire fighters onto the fire line.

(8) Our unit was selected as riot control for the Olympics, due to this we spent one year of training (on weekends), learning Mobile Field Force training. The Sheriff's Department sent three or four people for a three day course to train the Department. During the training I was able to assist the trainers due to the fact that I had much more training through the military than our trainers had received. Also this training was conducted at our armory, so the Sheriff's Department did not have to pay for the security of the building. I was able to assist in the training and provide the security of the building so the Department didn't have to pay another member of the unit to be there.

(9) I have a HAZ-MAT certification to transport hazardous materials which on patrol would assist me in identifying hazardous spills and what procedures to take.

(10) We train with our weapons every time we go to the field. I am also a weapons instructor for the unit.

(11) We spend two hours every drill at NCO-DP. We are trained in many different leadership development courses such as counseling and mentoring our peers, which has been very beneficial to my performance in the Department.

(12) As a Peace Officer , I must attend 40 hours of POST (Peace Officer Standards and Training) approved training per annum. Utah County pays me to take this training. POST approved courses (76 hours) I took on . . . [my] military leave was paid at straight time, whereas I would have been paid for most of the above in-service training at the overtime rate.

Similar benefits are received by all state and local governments. Military duty is clearly distinguishable from "second jobs."

## **CONCLUSION**

For the reasons set forth above, Utah County's former military leave policy, in our opinion, does not violate the equal protection provisions of the Fourteenth Amendment to the United States Constitution, nor is the policy illegal or unconstitutional under Utah law as an allegedly unlawful transaction or disbursement of government funds or resources. On the contrary, government laws or policies providing for paid military leave represent a widely accepted national practice not reasonably subject to legal challenge under existing law or legal precedent. As a matter of sound public policy, military leave serves as an incentive to encourage service in the reserve components and facilitates maintenance of a trained military force. Under the "Total Force" concept, laws and policies which encourage membership and participation in the reserve component have become much more critical to the security and defense of the United States than they ever were at the time of the draft. Moreover, the

discipline, skills and public spirit acquired through military service benefit the public and clearly enhance the effective performance of public employees.

At a time in the nation's history where the United States is engaged in a world wide campaign against terrorism, and has already sustained massive casualties on the United States mainland, we encourage government agencies to set the example in supporting, sustaining, and encouraging the volunteer forces upon which the nation's security depends.

Sincerely,

MARK L. SHURTLEFF

Attorney General

MLS/hfp

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### Endnotes

1. A copy of the former Utah County military leave policy at issue here is attached at [Exhibit A](#). As more fully explained herein, Utah County's present policy is based on erroneous legal advice which has effectively eliminated military leave as a viable policy in Utah County. See [Exhibit B](#).
2. The approximate number of employees and the estimate of reservists referred to above is referenced in the Minutes of Public Meeting, Board of Utah County Commissioners dated May 30, 2000. In subsequent contacts with Utah County and military sources, this office was unable to confirm the precise number of Utah County employee reservists, although the number is probably somewhere between thirteen and twenty-five.
3. Although legally irrelevant, it is by no means clear that military reservists work fewer hours over the course of a year than do other employees. By way of example, JAG officers would generally work harder and longer before and after leave in order to accommodate time away from the office. In other words, no one takes over their cases, and the work is still there when they return. Further, notwithstanding Mr. Bryson's alleged concern over "more pay for less work," public employee leave policies generally do just that in the case of vacation leave by awarding more leave, at a higher rate, to senior employees which would equate to more leave for less work.
4. Although reliance on the draft ended in 1973, the representation that the Selective Service does not "function" is untrue. In accordance with 50 App. U.S.C. § 453, young men are still required to register with the Selective Service regardless of the fact that the armed forces do not currently rely on conscription.
5. As of June 12, 2002, the "[t]otal number [of National Guard and Reserve personnel] currently on active duty in support of the partial mobilization for the Army National Guard and Army Reserve is 32,939; Naval Reserve, 8,971; Air National Guard and Air Force Reserve, 37,028; Marine Corps Reserve, 4,123; and the Coast Guard Reserve, 1,544. This brings the total reserve and National

Guard on active duty to 84,605, including both units and individual augmentees. See *United States Department of Defense, News Release: National Guard and Reserve Mobilized as of June 12* (released June 12, 2002) <[http://www.defenselink.mil/news/Jun2002/b06122002\\_bt300-02.html](http://www.defenselink.mil/news/Jun2002/b06122002_bt300-02.html)> (attached with printouts at [Exhibit J](#)).